No. 20,993

In the

United States Court of Appeals

For the Ninth Circuit

SCOTT LUMBER COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Reply Brief

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QUESTIONS PRESENTED

The Government appears to disagree with Appellant as to the questions to be presented on this Appeal, although it has not appealed. On the contrary, the Government attempts to shape and trim the questions for consideration on this Appeal in a form favorable to it (Br p.2).* Rule 18(3) of this Court does not require "Specifications of Error" to be stated in an appellee's brief for obvious reasons. However, in the pursuit of its unorthodox approach, the Government has set forth its own versions of the "Questions Presented" (Br p. 2). The first two errors stated by the Government merely paraphrase the first two given by Appellant in its Brief as required (Op.Br p.5). The remaining two errors specified by the Government hardly resemble the four additional errors specified by Appellant (Op.Br pp.5-6), and so the Gov-

*Throughout this Reply Brief, Appellant's Opening Brief will be referred to as "Op.Br" and the Government's Brief as "Br".

ernment Brief is in these particulars not a reply to Appellant's Brief and argument, but rather in support of its own notions as to what this Court should consider.

STATEMENT OF THE CASE

Also, no Statement of the Case is required of Appellee in its brief "unless that presented by the Appellant is controverted." Yet, without challenging any part of Appellant's Statement, the Government devotes six and one-half pages to its own Statement (Br pp.3-9) and converts it into a preliminary argument. Since the Government Brief was prepared 3,000 miles from the site, a lack of familiarity with the territory as well as the Record, has made this Statement justifiably suspect. For example, the existing roads which are some twelve to sixteen feet in width were not built by the Forest Service in the years 1929 and 1930 as stated. On the contrary, Mr. Stathem was testifying in the passage referred to as to the condition of the roads just prior to May 18, 1960 (R 1152), at a time when they were fully and completely owned by Appellant, Scott. Prior to 1950 the Government had built fire trails in this then unopened territory (R 68, 78-80). These fire trails were improved and made over by Scott into prudent operator's logging roads suitable for the harvesting of timber (R 1153, 79) and were used successfully by Scott and others for this purpose (R 78, 20-21, 99, admitted Br p.4).

The condemned right of way did include the existing roads plus additional strips at either side for widening the roads for "safety" (Br p.3). See Appendix A Op.Br. Mr. Stathem at the beginning of his testimony frankly stated (R 1155) that the widening of the road:

> "Will take care of *off-highway* loads* and enable a logger to proceed on this road with a safe speed of 30 miles an

*Off-highway loads are those which are too wide and too heavy for California public roads and are prohibited for use on highways by the Motor Vehicle Code. Only one logger uses the prohibited vehicles—Lorenz Lumber Co.

hour as contrasted with the 20 miles an hour road system that was there before."

The reason for widening the roads for "safety" was unequivocally stated by Mr. Toler to have been generated by the over-sized, off-highway trucks of Lorenz, and even this did not provide the necessary safety: (R 216-217)

"THE COURT: Can't we establish—I am quite curious to know what kind of a road is this. Is this a single width road, this road that extends out to the east from Section 31 on this County Road, is this a single width road or is it a double width road?

"THE WITNESS: In portions it is double width. Other portions, I'd call it about one and a half with passing lanes. Several of the trucks using the road are ten foot bunk or twelve foot. I believe most of them ten. They use that cheese block, which is a small triangular stake, and the logs are placed at the end and the log would extend at least another foot and a half on out past that. So the total width of your truck loaded would be in the vicinity of twelve, maybe thirteen feet, where our trucks for the Company all have to go on highways and you are only allowed by the Motor Vehicle Department a total width of eight feet. If we extend beyond that we are in violation of the law. So these trucks carry two and a half times to three times what our highway trucks do because of the off-highway haul to this Lorenz Mill. They are not an object that can pull over on a blind turn such as the turns going into this Section 31, because it is quite a twisty road, and with the weight behind them and the grade, and if the road has been recently watered it is slick, it would be impossible to pull that truck over if a fire truck is coming or any other vehicle. So the other vehicle would just have to give or you'd have a head-on crash of which in the past there has been two or three crashes between vehicles or between logging trucks."

While this testimony was given with respect to the highway connecting between the county road and Sec. 31, it established that safety and speed could not be attained by merely widening the road for Lorenz over-sized trucks. Lorenz is the only logger using highway-illegal trucks. This testimony was never refuted.

The condemned roads gave no additional access to Government lands than before as there had always been free access to Government timber land over Sec. 31 (R 1153). It is true that Mr. Stathem stated in righteous terms that the widened road was necessary for "unrestricted competitive bidding" (R 1148), but Mr. Toler's testimony shows that this purpose was not the fact, and further does not effect any safety, but on the contrary results only in an unfair preferential treatment to the only bidder, Lorenz, with over-sized highway-illegal trucks which are dangerous under any circumstance.

The remainder of the arguments of the "Statement of the Case" will be responded to appropriately under the points as they arise in the Argument.

ARGUMENT

Summary Judgment

The gravamen of the Government argument in support of the Summary Judgment is that if the pleadings state that the taking of private land from private ownership is for a public purpose, then this statement alone makes the taking incontestible in the courts. This is said to be true even if facts alleged in opposition to the taking are to the contrary and the taking itself is contested on this ground (Br pp. 14-15). The facts alleged here show that the taking was unnecessary and wasteful for there was already a satisfactory road system available (R 59) and in existence without cost, that there was never any denial to anyone of access to Government timber land over the existing road system (R 59) and that the Forest Service, the Watt Interests and Lorenz

were engaged in a conspiracy to deny Government timber to Appellant Scott behind the sham of "free competitive bidding."

Lorenz now has, and had at the time of the condemnation, an agreement with the Watt and Lamm Interests and the Forest Service to build the roads through Sec. 31 and charge for the use thereof, in the removing of Government and Watt interest timber (T 32). The gaining of control over the private roads of Sec. 31 was first attempted by negotiation of the Forest Service and Lorenz (T 33-38). Failing in these negotiations the Forest Service brought condemnation (T 39). Even though no written agreement was signed between the Forest Service, Lorenz and Watt, it was admitted that the discussions became the agreement (T 68).

Solely for the purposes of carrying out this private agreement the Forest Service at a single stroke by condemnation secured the control of the roads, gave an enormous bidding preference to Lorenz alone, and destroyed Appellant's timber management of Sec. 31 which is its own private property. No matter how pious the words of the taking are expressed, it is submitted that these results show mere caprice and arbitrary action in bad faith by administrative officials responsible for the condemnation.

If such matters cannot be questioned and determined by the Courts "but relate, rather to forest management purposes which are matters exclusively for the Forest Service" (Br p.6) which is the power to cripple and destroy the private timber industry, then indeed we have become a land of tyranny by men instead of justice through law.

The Government attempts to sidestep the real issue on the right to Summary Judgment under Rule 56(c) FRCP, i.e., that Summary Judgment is not to be granted unless there is no genuine issue as to any material fact, and the Government entitled to Judgment as a matter of law. It does appear that where the facts alleged, if proved, would show the taking was arbitrary, capricious and a violation of private rights, genuine issues of material facts

are raised. In making the Order (T 153-159) which was arbitrarily converted into Summary Judgment (T 160) the Trial Court stated: (T 155)

> "The facts alleged by Scott, taken in the light most favorable to Scott, do not show that the action of the officials has such an arbitrary, capricious, or bad faith quality as to justify interference by this Court."

The Court not only recognized that there were genuine issues of fact, but weighed them in concluding that they were not of sufficient intensity to justify interference. In such a circumstance it cannot be fairly asserted by the Government that there were no genuine issues as to any material facts. The granting of Summary Judgment was error, and Appellant should not have been denied the opportunity to prove its defenses.

The District Court's Failure to Abide by and Adhere to the Pre-Trial Order Is Inexcusable

The Government Brief devotes very little space to this point (Point 2, Op. Br pp. 5,14) except for a restatement of some of the facts (Br. pp. 21-23). The Pre-Trial Order (T 194-6) stated unequivocally that title to Sec. 31 was in fee simple in Appellant, subject to a specific easement in favor of the Watt Interests, and for which they disclaimed any further interest and in the amount to be awarded. These facts were to govern without the necessity of proof at the trial. The Pre-Trial Order was not something dashed off informally and without full consideration. On the contrary, it was prepared by the Government after conferences with both the Court and Appellant's then counsel, Gregory S. Stout, Esq. (See Appendix B herein*) It was the culmination of negotiation. In return for the Government's recognizing Appellant's title in fee simple, subject only to the easement of the Watt Interests,

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*In preparing the Transcript the Clerk omitted items (ii) and (iii) of the Second Supplemental Designation and the same are reproduced in the Appendix at the end of this Brief.

Appellant agreed to accept the timber valuation urged by the Government (T 195). The Pre-Trial Order accordingly contained both of these concessions.

Appellant vigorously challenges both the legality and ethics of the Government by surreptitiously persuading the Trial Court to adopt the portions of the Pre-Trial Order favorable to it but ignore the portions unfavorable. One can understand how the Government, upon second thoughts, might have considered it had made a bad deal and then asks to be excused from the entire Pre-Trial Order. But this it did not do.

However, the attempt to sustain this trickery, especially in the light of the Affidavit of Gregory S. Stout, Esq., a respected member of this Court, simply aggravates an unseemly situation, and certainly is not the conduct expected from the Government.

Upon the motion for a New Trial the Trial Court, too, was hard put to justify the departure from the Pre-Trial Order without protecting Appellant. It was forced to go outside the Record to rely upon matters which are *not in the record* (R 248), are not now before this Court, and which are disputed.

The Government seeks to exculpate itself by asserting that there was no objection at the time of trial to its conduct. Mr. King, who represented Appellent at the trial, was wholly unaware of the situation and had simply relied upon the Pre-Trial Order in good faith in the preparation of this case. He could not have known, or even been aware of the trap which was to be sprung on him during the presentation of the Government's case. And, lacking experience, as both the Court and Government well knew, he appears to have tried to continue with the case instead of risking, what to him, must have appeared to be the wrath of the Court by impugning the *bona fides* of the Government's defense.

It is likewise no answer to say that the Pre-Trial Order does not state that the Watt easement was the *only* encumbrance. This merely compounds the bad faith which now must be considered

deliberate (see Affidavit of Gregory S. Stout). Title to Sec. 31 was an issue in this case and this issue was determined by the Pre-Trial Order and removed from further consideration of this issue during the trial, except in accordance with the provisions of Rule 16, F.R.C.P.

The error is admitted in that the Pre-Trial Order was not adhered to (T 247) and the Government's attempt to now explain it away is sophistry. Indeed, the present situation illustrates most forcefully why a trial court should not, *ex parte,* deviate from the Pre-Trial Order, without, at least, making clear to the aggrieved party that a variation is being sought by the opposition and affording the aggrieved party the right to realign to meet the new situation. The mischief worked here by an unscrupulous Government coupled with an insensitive judge and inexperienced counsel could easily be avoided if trial courts are required to abide by Federal Rule 16.

The Government in its Brief makes no effort to deny that there was a departure from the Pre-Trial Order. It states only that "The district court did not erroneously disregard the pretrial order." (Br p.10),—that there was no error in so doing.

The Insufficiency of the Valuation Testimony of the Government Witnesses Remains as Error

The introductory paragraphs of the Government Brief on this point (Br p.15) are an attempt to gloss over what Appellant considers and has stated as the strident attitude of the Government in this litigation (Op. Br p.43). In justification, only a self-serving statement of Government counsel is referred to. Quite naturally he would do everything to justify his conduct. So far as the victim is concerned, the execution is not made any more acceptable or less final merely because the executioner is pleasant about it and smiles a little.

(a) *The California Forest Practices Act.* A fundamental error which the Government valuation witnesses, Howell and Linville, made in arriving at their conclusion as to value was their failure to consider the Forest Practices Act of the State of California. Sec. 31 is private land and the cutting practices are governed and controlled by the laws of the State of California—not the U.S. Forest Service. There is not one line of evidence to show that either Howell or Linville, the Government valuation witnesses, considered the cutting practices required by the state law in giving their valuation opinions. Neither one was familiar with the practices required of a logger or a timber management operation (Howell, R 1325; Linville R 1445-6), and therefore they cannot be assumed to have known about, or had any experience with the California Law on this vital subject.

The argument made by the Government is largely one of semantics. The Brief criticizes Appellant's use of the term "cut out and get out" as being coined by Appellant's counsel (Br p.24). Counsel did not dream up this phrase. It is one used commonly throughout the industry and has been used for many years to mean precisely what the Government witnesses Howell and Linville, had in mind when they admittedly stated that the property was appraised on the basis of a "full cut or immediate harvest" (Br p. 25).

> "Clear cutting means to cut the timber indiscriminately without reference to its size or merchantability. This practice is in violation of the California Forest Practices Act."

There was not one line of testimony in the entire Record to show that "full cut" and "immediate harvest" mean anything other than clear cutting.

Howell stated on direct examination that: (R 1299)

> " * * * the highest and best use of this property from all of the information that I could gather of a single section of land that was owned by Scott Lumber Company was for

the immediate harvest of the timber that was on that property."

He then considered the value of the land without the timber and stated with reference to sales of cut over timberland: (R 1299)

"These assisted me to estimate the market price that this property would be sold for, that is, the cut over timber land value, and considering what these had sold for, * * *"

Howell had managed only his own cut over land and when asked to explain the harvest of the timber on his land, stated: (R 1326)

"Well, the land in my own case was fenced pasture area, so it could possibly be given additional light into the area for additional grass growth."

And again, on cross-examination Howell stated: (R 1366)

"I think that the greater percentage of the buyers of this section of land would most likely harvest the timber to get away from the risk that he would have of fire, the risk that he has of not having a road which would be available to him unless there was a Forestry road that was going to be built in there, to get his money out. In other words, he has got a big investment in the purchase of this property, and the way to salvage that investment, besides making some money, is to get in while the market is strong. He had no guarantee that the market was going to be strong a year from that time or five years from that time or ten years from that time."

Linville stated: (R 1409)

"I concluded that as of May 18, 1960 the highest and best use of this property, that is, the use which would bring the highest price if it was offered for sale in the open market under the terms of fair market definition, would be to sell it to someone who would cut the timber off as quickly as they could."

How fast is quickly? Linville stated one or two seasons (R 1438, 1464)

Neither Howell (R 1335, 1352) nor Linville could find any property comparable to Sec. 31 upon which to base a value. It is beyond dispute that the only property which either of them used to make a comparison was cut over timber land (R 1307-1309; 1453). The magnitude of the error of ignoring those portions of the Pre-Trial Order favorable to Appellant are here apparent. If Appellant had been able to treat the Sec. 31 as timbered land, instead of having the timber value separately decided in advance (as was agreed to in the Pre-Trial Order), the Government's experts would not have been qualified. Yet when Appellant's experts relied upon the Pre-Trial Order by treating the property as owned by Scott, subject only to the Watt Interests' right of access, they were bitterly attacked by the Government and the Court for being remiss and omitting key facts. Typical of Howell's view of cut over timber land is his testimony: (R 1350)

> "No, it was a property that had been cut over so there were roads back in through the hills like there would be with any timber harvest * * *"

Linville stated that his investigation showed (R 1422)

> "* * * there was a good market for cut over land."

In response to a question as to whether the cut over property which he has used as comparable, had a road system which could be used as such, Howell stated: (R 1351)

> "I do not think it did as such. I think that a small property like this more than likely they would move into one spot and harvest the whole thing from one setting."

Linville was very clear as to what he meant by cut over timber land: (R 1455)

> "I think that the market is representative generally of properties throughout the area. A purchaser of Section 31 would log it, and then he would have cut-over timber land

> he could do what he wanted to with, he could either sell it to somebody for some other purpose, or he could retain it for his own use."

Their testimony is replete with such statements which can have no other meaning than " clear cutting", and that their opinions were based upon "clear cutting" which is admitted by the Government to be a violation of the California Forest Practices Act.

The attempt of the Government's Brief to explain away the obvious disqualification of the valuation opinions was that both witnesses relied upon the Bunting timber cruise. The Bunting timber cruise was never accepted as accurate by Appellant, Scott. It related only to the timber in the area which was condemned for use as a road (R 1258). All of that timber had to be clear cut because in making a road it is impossible to leave any trees growing, no matter what size, and still have a usable road. The clear cutting of the Bunting cruise was used by both Howell and Linville in formulating their valuations (Howell, R 1258, 1299; Linville, R 1407-1408).

Appellant does not dispute that Mr. Stathem testified that the timber of Sec. 31 could be cut down to the allowable limitation within the State Practices Act, but he was not a Government valuation expert. He was a Government Forester who knew and was supposed to know, what the allowable limitations were, but such knowledge cannot be imputed to the Government valuation witnesses who were not experts in forestry and did not take these limitations into consideration with regard to clear cutting.

Another limitation which the Government Brief attempts to insert in the testimony is that immediate harvest or full cut as testified, included only "merchantable" timber (Br p. 25). There was not one line of testimony to support this and as has been indicated above, the whole valuation testimony of Howell and Linville belie this clever attempt to hide the facts. Furthermore, it seems clear that if a full cut and immediate harvest,

as testified to by the Government valuation witnesses, meant something other than that which they each stated, then the Trial Judge should have been alert to protect Appellant as well as the Government, to make this clear in his rulings on the evidence and in the instructions to the jury that "full cut" and "immediate harvest" included only "merchantable" timber. Obviously, this was not done. Thus, the total disregard of the California Forest Practices Act in arriving at a valuation is a fundamental error of such proportions that the valuation opinions are useless and should have been stricken.

The same standard should have been applied to strike the valuation opinions of the Government experts for failure to consider this vital matter which made their opinions valueless.

(b) *The Most Profitable Use* The response to Appellant's analysis of the Record showing that the Government valuation witnesses based their testimony upon the highest and most *profitable use* instead of the highest and *best use,* is characterized as a "quibble" (Br 25). If words are to mean anything in the communication of ideas, then "highest and most profitable" use cannot mean identically the same thing as "highest and best" use. Profitable use involves a speculation as to further events, including markets, costs, and all other elements involved in the accounting and economics for the determination of profits. The speculative aspects of profitable use were recognized by Howell (R 1366). It includes such intangibles as the amount of effort and the kind of effort that is put into the venture. It also involves know-how applied to the effort. All of these are factors of economics and accounting which are taken into consideration, balanced with one another and then only is it determined whether or not a profit or loss has resulted. Neither Howell or Linville were accountants nor in any way skilled in accounting procedures, and in fact, neither one had had any experience in economics or in the opera-

tion of the lumber business. There was just no way for either of these men to determine "the most profitable use" of Sec. 31, and when they were testifying as to the most profitable use they were speaking as laymen and their opinions were wholly improper. This is especially true in the light that Appellant's witnesses Berry and Toler, who have had years of experience in the lumber industry, both testified that the highest and best use of Sec. 31 was timber management—conservation of this resource. The highly experienced Mr. Stathem agreed until the Government attorney influenced his testimony. (Op. Br pp. 29-30)

It is submitted that the quotation from *Olson v. United States,* 292 U.S. 246, 255 (1933) (Op. Br p. 33) is a complete demonstration that "highest and most profitable use" is *not* the equivalent of "highest and best use", but that profitable use is merely one factor in the determination of market or actual value. To permit valuation witnesses to testify as to profitable use when they are not qualified to discuss such economic and accounting matters, makes their testimony wholly improper. Their valuation opinions were thereby rendered useless.

(c) *The Mythical Prospective Purchaser* Appellant has demonstrated that in arriving at their figure of a fair market value both of the Government witnesses, Howell and Linville, considered only the buyer who owned no timber land and therefore was interested only in clear cutting, getting a profit if he could, and getting out, to the exclusion of any other type of buyer (Op.Br p.35). The Government makes no response to this point, and it is assumed therefore that this is conceded.

The exclusion of one class of buyer or the consideration of a single class of buyer is error which cannot but discredit the valuations of the Government witnesses and make their testimony improper, and valueless.

(d) *Special Service Roads* The Government's Brief (p. 28) notes the direct opposition between the written terms of the

Special Use Permit for the use of Government owned roads and Mr. Stathem's testimony in which he: (Br p. 29)

> "* * * merely explained how the terms of the permits had been construed and applied and how he was applying them."

It is beyond dispute that Mr. Stathem was not acting in accordance with the express terms of the written agreement with the user and that this practice of personal interpretation could come to an end at any moment without prior notice. Also, that the Government could repudiate Mr. Stathem's personal and improper interpretation and hold the user to the exact language of the written agreement. It seems elemental that under these circumstances the written agreement must take precedence.

It is said (Br p. 30) that the matter was put correctly in its proper perspective by the Court in its instructions to the jury (R 1684). This instruction refers to charges to be made against a user for the use of the road. It has nothing whatever to do with the provisions of Special Use Permits requiring that the road shall be open at all times to the free use of the public. In making the assumption based on Mr. Stathem's testimony that a road, such as the condemned roads operating under Special Use Permits, could be closed at the will of either the user or the local Forester, is just not in accordance with the written Special Use Permits. There is no dispute that the valuation witnesses of the Government relied upon Mr. Stathem's testimony rather than the written terms of the Special Use Permits, which are exactly contrary. This is one more example of the basic inaccuracies of the Government valuation witnesses which makes their testimony unreliable. Since Appellant's valuation witnesses' testimony was stricken because of claimed factual insufficiencies, the same rule should have been applied to the Government witnesses, and their valuation testimony stricken.

The Court's Error in Striking the Testimony of Defendant's Valuation Witnesses, Sanders and Wall

In attempting to reply, the Government Brief fails to comprehend the nature of this error.

A facet of this point is that Wall's testimony was stricken because in giving his evaluation he did not consider the so-called Southern Pacific easement, which, it will be remembered, had been excluded from the trial by the agreement of the Pre-Trial Order. This portion stands or falls upon the determination by this Court as to whether or not a Pre-Trial Order means something, or can be ignored at will, in violation of Rule 16 F.R.C.P.

A second facet to this point is that the Trial Court repeated the denunciation of Defendant's witness Wall on the ground that he failed to consider the Southern Pacific easement, as shown by the numerous Record references in the Government's Brief (p. 17). However, the striking of the testimony was actually delayed and the comments with respect to this evidence made at a most critical time in the trial, which was just before the instructions to the jury. This resounding and devastating attack upon Appellant's witnesses was the last thing presented to the jury before the instructions and could not have done other than wittingly or unwittingly shape the pre-judging of Appellant before the jury. This Appellant submits is the prejudice which demands a reversal of the Judgment.

A third facet of this is the emphasis given to Appellant's position and the failure to even mention the Government's comparable position. Appellant believes that the Trial Court had a right to comment upon the testimony, but it states that this comment should be fair. It also means that the comment should be applied to both parties equally and not just to one party, as was done here.

It is for all of these reasons that the conduct of the Trial Court is believed to be reversible error.

The Error with Respect to the Instructions to the Jury

Appellant is fully aware of the provisions of Rule 51, F.R.C.P.:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

As will be noted from the Record, no particular Instruction was alleged as error. The Appeal was not taken on the ground of the giving or refusal to give any particular Instruction. This is not the basis of the Appeal. The issue on this point is that regardless of the instructions given or refused, the Court is under a duty to make certain that the instructions are proper. It is Appellant's position that with respect to the determination of the highest and best use, this meant the highest and best *legal* use, and that a court in making an instruction contrary to the laws of the State of California is error *per se*. It is also Appellant's position that the failure by inexperienced counsel to object to the giving of an instruction, or the failure of such counsel to ask for a proper instruction, does not excuse the Court from making sure that the instructions given are proper and adequate. After all, the attorney has no real control over what instructions are given, and that this is primarily the responsibility of the Trial Court. Failure in this responsibility is the error for consideration on this point. It was this failure that led to the miscarriage of justice.

CONCLUSION

Appellant believes that the opportunities afforded in filing this Reply Brief have greatly clarified the respective positions of the parties and simplified them to a point where the errors are fully apparent. It is further believed that Appellant has completely sustained its burden of showing the errors and that the Judgment of the lower Court must be reversed.

Respectfully submitted,

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A certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY GIFFORD HARDY

(Appendices Follow)

Appendix A

In the United States District Court for the Northern District of California, Northern Division

Civil No. 8095
20993

United States of America,
Plaintiff,

vs.

23.5727 Acres of Land, more or less, in the County of Shasta, State of California; Scott Lumber Company, Inc., a Corporation, et al.,
Defendants.

SECOND SUPPLEMENTAL DESIGNATION OF THE RECORD ON APPEAL

In designating items for the Record on this Appeal, two items were inadvertently overlooked. Accordingly, the Clerk of the District Court is therefore requested to certify and send forthwith the following two items to the Clerk of the Court of Appeals for the Ninth Circuit at San Francisco for inclusion in the Record on Appeal:

(i) The Amended Motion to Alter or Amend the Judgment filed February 12, 1965.

(ii) The Affidavit of Gregory S. Stout, Esq., filed May 6, 1965 in support of the Motion for New Trial.

(iii) This Second Supplemental Designation.

HENRY GIFFORD HARDY
Henry Gifford Hardy

ALFRED B. MCKENZIE
Alfred B. McKenzie

Attorneys for Defendant
Scott Lumber Company, Inc.

WILLIAM E. ROLLOW
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the above Second Supplemental Designation have this day been mailed to Charles R. Renda, Esq., Assistant United States Attorney, 16th Floor Federal Building, P.O. Box 36055, 450 Golden Gate Avenue, San Francisco, California 94102.

HENRY GIFFORD HARDY
Henry Gifford Hardy

Dated: June 7, 1966.

Appendix B

In the District Court of the United States for the Northern District of California Northern Division

Civil No. 8095

United States of America,
Plaintiff,

vs.

23.5727 Acres of Land, more or less, in the County of Shasta, State of California; Scott Lumber Company, Inc., et al.,
Defendants.

Affidavit of Gregory S. Stout on Behalf of Defendant's Motion for New Trial

Gregory S. Stout, being duly sworn, deposes and says:

1. That he is an attorney, licensed to practice in the Courts of the State of California and United States, and maintains offices at 220 Bush Street, Suite 360, San Francisco 4, California.

2. That he was attorney for Defendant, Scott Lumber Company, Inc., for a period of several years and participated in the negotiations between Scott and the United States, Division of Forestry, Department of Agriculture, in connection with the above entitled action, at many meetings with representatives of the Government in Redding and San Francisco. In attempting to negotiate the disposition of the case, no mention was made of any claim of easement asserted by the Southern Pacific Company.

3. He represented the Scott Lumber Company, Inc. at the Pre-Trial Hearing before Judge Halbert on July 13, 1964. In view of the fact that Southern Pacific Company had filed a disclaimer,

no mention was made of Southern Pacific Company's position in Pre-Trial memoranda filed by any of the parties. The sole concern of the parties related to the interest of Watt and Lamm at the Pre-Trial hearing. Through their then attorney, Daniel S. Carlton, a statement was read which indicated to the Court and counsel that a disclaimer would ultimately be filed. Again no mention was made of any Southern Pacific interest in Sec. 31 at the Pre-Trial Hearing. At no time was any issue raised with respect to any Southern Pacific easement or interest and so it was not included in the Pre-Trial Order.

4. The Pre-Trial Order sets forth accurately, the status of the ownership of Sec. 31 as discussed and agreed upon in good faith by counsel. There was no reason to suspect and it did not even enter his mind that anything was being withheld by the Government, in the language of paragraph (2) of the Pre-Trial Order, and he does not believe there was any intent to withhold anything.

5. In view of the fact that all defendants, other than Scott, had disclaimed and were thereby entitled to no compensation for their interests from Plaintiff in view of Plaintiff's taking, there would be no logical and legal reason for any of the experts to consider any Southern Pacific easement in derrogation of Scott's position and Scott's entitlement to full compensation.

Further Affiant saith not.

Dated: May 4, 1965

GREGORY S. STOUT
Gregory S. Stout

Subscribed and sworn to before me this 4th day of May, 1965.

/s/ MARIAN S. KAYNE

[Seal] *Notary Public*